IN THE

Supreme Court of the United States

October Term, 1977

No. 77-338

SANDRA WETZEL and MARI ROSS, on behalf of themselves and all others similarly situated,

Petitioners,

v.

LIBERTY MUTUAL INSURANCE COMPANY, a corporation,

Respondent

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

HOWARD A. SPECTER
MICHAEL D. BUCHWACH
LITMAN LITMAN HARRIS & SPECTER, P.A.
1701 Grant Building
Pittsburgh, Pennsylvania 15219
ROBERT F. STONE
FINE, PERLOW AND STONE
1531 Frick Building
Pittsburgh, Pennsylvania 15219
Attorneys for Petitioners

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Supplemental Brief In Support Of Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

INTRODUCTION

On September 2, 1977, Petitioners, Sandra Wetzel and Mari Ross, on behalf of themselves and all others similarly situated, filed a petition praying that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit. A memorandum in opposition was filed on behalf of Liberty Mutual Insurance Company ("the Company"). Thereafter, on December 6, 1977, this Court decided *Nashville Gas Co. v. Satty*, 46 U.S.L.W. 4026 (U.S. 1977). Because the application of *Satty* mandates the issuance of a writ in this case, Wetzel and Ross submit this supplemental brief in support of their petition pursuant to Rule 24(5) of this Court's Rules.

ARGUMENT

The Court of Appeals Has Decided Important Questions of Federal Law in a Way in Conflict With Applicable Decisions of This Court.

Only one conclusion can be drawn from an application of *Satty* and *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), to the Third Circuit's opinion with respect to the violation of Title VII alleged in this case. That decision is clearly contrary to federal law. The court of appeals denied Petitioners the opportunity to demonstrate "through the presentation of other evidence...that exclusion of pregnancy from the compensated conditions is a mere '[pretext] designed to effect an invidious discrimination against the members of one sex or the other....'" *Satty, supra*, at 4028. It is now this Court's duty to rectify the lower court's error. The court of appeals erroneously concluded that the similarity between the Company's Income Protection Plan and the disability insurance program in *Gilbert* foreclosed further inquiry into the merits of Petitioners' claims (3a). *Gilbert* discloses only the initial step in the analysis, however. As Justice Rehnquist analyzed the Court's earlier ruling in *Gilbert*:

> We of course recognized in both *Geduldig v. Aiello*, 417 U.S. 484 (1974), and in *Gilbert, supra*, that the *facial neutrality of an employee benefit plan would not end analysis*.... *Satty, supra*, at 4029. (Emphasis supplied.)

Satty is also controlling on the question of the relevance of the Company's other discriminatory pregnancy-related and hiring and promotion practices. Unlike the case in *Satty*, where the district court had determined that certain of Nashville Gas Company's other practices passed muster under Title VII, the district court in this case concluded that the Company's mandatory discharge, leave and return date practices, which applied only to pregnancy-related disabilities, were all unlawful (43a). The court of appeals affirmed the district court's decision on the mandatory

return date, the only issue which the Respondent presented to it. *Wetzel v. Liberty Mutual Insurance Co.*, 511 F.2d 199 (3d Cir. 1975), *vacated on jurisdictional grounds*, 424 U.S. 737 (1976). Petitioners therefore have demonstrated that at least five of their employer's practices constitute prohibited sex discrimination. The court of appeals reviewed the policy which is before the Court in isolation, however. In *Satty*, this Court held:

> Petitioner's refusal to allow pregnant employees to retain their accumulated seniority may be deemed relevant by the trier of fact in deciding whether petitioner's sick-leave plan was...a pretext. *Satty, supra*, at 4029.

Satty thus allows an aggrieved party to present evidence of other discriminatory practices in order to demonstrate that a challenged practice is also unlawful. In light of *Satty*, as well as this Court's other decisions concerning methods of proof in a Title VII action, Petitioners are entitled to proceed on the merits.

In *Satty*, the Court appears to have limited its remand due to the fact that the action had been instituted and the issues framed after the decision in *Geduldig v. Aiello*, 417 U.S. 484 (1974). No justification exists for imposing a similar limitation in this case. Petitioners commenced this action in February, 1972. Their motion for partial summary judgment was filed before discovery was closed and was granted in January, 1974, long before *Aiello*. After the remand in this case, they urged the court of appeals to uphold the summary judgment or, if the court concluded that summary judgment had been granted prematurely, to afford them an opportunity to develop the record and proceed to trial on the merits. Instead, the court simply concluded that *Gilbert* was controlling, refused to consider the Respondent's other discriminatory practices and vacated the judgment. Petitioners were denied the opportunity to present to the trier of fact the very case which *Gilbert* and now *Satty* give

them the right to present. Petitioners now should be permitted to prove a gender-based discriminatory effect as well as a gender-based discrimination.

CONCLUSION

Satty has confirmed the accuracy of Petitioner's previously stated contention that *Gilbert* did not hold that the exclusion challenged here is *per se* immune from Title VII attack. If this Court declines to grant the requested writ, this case, which Petitioners have litigated vigorously and in keeping with every established and evolving principle of Title VII law for nearly six years, will slip into anonymity without even the opportunity for a fair adjudication on the merits. If Petitioners are denied an opportunity to present their case to a trier of fact at this juncture, it will be only because they litigated too soon and too well in an early Title VII era. Their cause, which may be of little lasting moment to this Court, will be lost, and the answer to Mr. Justice Stevens' inquiry in *Satty* clearly will be "never." Not one member of this Court has suggested the propriety of that answer.

Sandra Wetzel and Mari Ross, on behalf of themselves and all others similarly situated pray, therefore, that their Petition for a Writ of Certiorari be granted, and that the judgment of the court of appeals at least be vacated with instructions that the cause be remanded to the district court for further consideration in light of *Satty*.

Respectfully submitted,

HOWARD A. SPECTER
MICHAEL D. BUCHWACH
LITMAN LITMAN HARRIS & SPECTER, P.A.
1701 Grant Building
Pittsburgh, Pennsylvania 15219

ROBERT F. STONE
FINE, PERLOW AND STONE
1531 Frick Building
Pittsburgh, Pennsylvania 15219

Attorneys For Petitioners